UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Charged Party; and

NERONE & SONS, INC. Case No. 08-CD-135243
R.G. SMITH COMPANY, INC. Case No. 08-CD-143412

Charging Parties; and

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 310

Party-in-Interest

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 310

Charged Party; and

NERONE & SONS, INC. Case No. 08-CD-135244
R.G. SMITH COMPANY, INC. Case No. 08-CD-143415

Charging Parties; and

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Party-in-Interest

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S
POST-HEARING BRIEF

Respectfully Submitted,

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I. Introduction

This matter does not concern rival unions, each making a claim to an innocent employer for the assignment of work. Rather, the Laborers' International Union of North America, Local 310 ("LIUNA 310") and Nerone have colluded to manipulate Section 10(k) proceedings as a tool to bypass the duly negotiated work preservation clause contained within the International Union of Operating Engineers, Local 18's ("Local 18" or "Union") collective bargaining agreement ("CBA") with the Construction Employers Association ("CEA Agreement"). LIUNA 310 and R.G. Smith Company, Inc. ("R.G. Smith") have also colluded to manipulate Section 10(k) proceedings in order to evade the duly negotiated work preservation clause contained within Local 18's CBA with the Associated General Contractors of Ohio. ("AGC.") Under established principles of administrative law, a union's enforcement of a lawful work preservation clause is not within the aegis of the Board's jurisdiction. As such, there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Indeed, Local 18 is only asserting its right to collect damages under the terms of its agreement which specifies a financial penalty in the event equipment within the Union's craft jurisdiction is assigned to someone other than an Operating Engineer. Local 18 has made no claim to the work identified in the Region's February 12, 2015 Order and Notice of Hearing and has traditionally performed the work at issue. Accordingly, there is no jurisdictional dispute, and the Charging Parties' allegations are not amenable to resolution under Section 10(k) of the Act.

The February 12, 2015 Order and Notice of Hearing for this matter should be also quashed on the basis that Local 18's substantive and procedural due process rights were critically abridged by the February 12 Order and Notice of Hearing. Specifically, the Region acted without jurisdiction under Section 10(b) of the Act by originating a complaint upon his own initiative, where the complaint contained insufficient facts to afford Local 18 appropriate procedural due process for the purpose of presenting its arguments in the present 10(k) hearing. Nonetheless, in the event the Board deems it fit to make a determination under Section 10(k) of the Act, it should award the disputed work to Local 18

because it unquestionably prevails on the factors of collective bargaining agreements, area and industry practice, economy and efficiency of operations, and relative skills and training. And even if Local 18 is not awarded the work at issue, a contrary award should be limited to the project at issue, as the jobsites have not been a continuous source of controversy in the relevant geographic area, related disputes are unlikely to reoccur, and Local 18 has not shown a proclivity to use proscribed means in an attempt to secure similar disputed work.

II. Parties

A. International Union of Operating Engineers, Local 18 and the Construction Employers Association

For over seventy years, Local 18 has represented the interests of building construction equipment operators ("Operating Engineers" or "Local 18 members") working in the State of Ohio. Currently, Local 18 represents approximately 15,000 operating engineers working in 85 of Ohio's 88 counties along with four counties in Northern Kentucky. (*Donley's I*, TR 1043-1046, 1050; *Donley's I*, Jt. Exhs. 1-2.)[1] Headquartered in Cleveland, Ohio, Local 18 operates five district offices across the State. (*Donley's I*, TR 1043-1051.) For decades, Local 18 has negotiated a series of CBAs covering the building construction industry with the CEA, a multi-employer bargaining association that represents construction companies throughout Northeast Ohio. These companies include, but are not limited to, Nerone. (TR 112, 116-117; L18 Exh. 1.) Presently, Nerone has elected to assign its collective bargaining rights to the CEA (Id.), and has recognized that by entering into such agreements, it was binding itself to the promises and the obligations contained therein. (TR 117.)

B. International Union of Operating Engineers, Local 18 and the Associated General Contractors of Ohio

[1] At the hearing, the Hearing Officer officially incorporated the records of three previous Section 10(k) proceedings. (TR 73.) The first case was *Laborers' Local 894 (Donley's, Inc)*, lead Case No. 08-CD-081837 (hereinafter "*Donley's I*"), the second case was *Laborers' Local 310 (Construction Employers Association)*, lead Case No. 08-CD-091689 (hereinafter "*Donley's II*"), and the third case was *Laborers' Local 310 (KMU Trucking & Excavating)*, lead Case No. 08-CD-109665. The hearing officer also officially incorporated the record of the subsequent ULP hearing before Administrative Law Judge Mark Carissimi in the *Donley's I* and *II* matters. ("*Donley's ULP."*) (Id.)

In addition to the CEA Agreement covering limited counties within Northeast Ohio,, Local 18 has for decades also negotiated a series of CBAs covering the building construction industry with the AGC, a multi-employer bargaining association that represents construction companies throughout the State of Ohio. These companies include, but are not limited to, R. G. Smith. (TR 218.) Accordingly, R.G. Smith has specifically assigned its collective bargaining rights to the AGC, and has recognized that by entering into such agreements, it was binding itself to the promises and obligations contained therein. (TR 219-220, 225-227, 230.)

C. Laborers' International Union of North America, Local 310

In addition to being signatory to the CEA Agreement with Local 18, the Charging Parties are also signatories to a CBA negotiated between the CEA and LIUNA 310. Unlike Local 18's agreements with the CEA and AGC, the CBA negotiated by LIUNA fails to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to LIUNA 310 is transferred to a non-laborer employee. (Emp. Exh. 2.) Also unlike Local 18's successive CEA Agreements, none of the agreements negotiated between LIUNA 310 and the CEA, prior to the current one, specifically identified forklifts and skid steers as construction equipment within their craft jurisdiction. (TR 346-347.)

III. Agreements

A. Local 18's CEA Agreement

By its own terms, the CEA Agreement specifically identifies the relevant bargaining unit. It does so by identifying: the geographic jurisdiction covered by the agreement; the type of work covered by the agreement; the identity of the employers covered by the agreement; the identity of employees covered by the agreement; and the type of work performed by those employees. (Emp. Exh. 1, ¶¶ 2-4, 6 10-13, 49, 50, 51.) Taken as a whole, these provisions provide a comprehensive framework that identifies the relevant bargaining unit as a multi-employer bargaining unit encompassing all building construction

employers working within a specific geographic region that have voluntarily bound themselves to the CEA Agreement.

In terms of the geographic region, the CEA Agreement applies to the "employment of and conditions under which employees shall work and rates of pay they shall receive on work in Building Construction within the following Ohio counties: Ashtabula, Erie, Huron, Lorain, Cuyahoga, Geauga, Lake, and Medina counties." (*Donley's ULP*, GC Exh. 5, Article I; Emp. Exh. 1, Article I.) (Emphasis added). In terms of craft jurisdiction, the CEA Agreement's mutual recognition clause states that the Union is recognized as the "exclusive collective bargaining agent for all Operating Engineers" within the eight counties covered by the CEA Agreement. (*Donley's ULP*, GC Exh. 5, Article II; Emp. Exh. 1, Article II.) Specifically, Article II, Paragraph 10 provides a comprehensive list of construction equipment that is identified as being within the contractual jurisdiction of Local 18. (Id.) Pursuant to this section, Local 18's contractually mandated work jurisdiction includes "*Forklifts*, *Skidsteers*, and all like equipment as described in paragraphs 49, 50, and 51 of this agreement and within the jurisdiction as assigned to the Union by the American Federation of Labor." (Id.) (Emphasis added.) Reinforcing that forklifts and skid steers are within the craft jurisdiction of Local 18 is the fact that they are also listed as equipment included within Paragraphs 49, 50, and 51. (Id.)

In addition to establishing Local 18's traditional and recognized craft jurisdiction clauses, the mutual recognition clause serves an additional, yet critical purpose by identifying the multi-employer bargaining unit subject to the Agreement. Specifically, it provides that the CEA is expressly recognized as the "exclusive collective bargaining agent for all Employers of the Operating Engineers" within the counties covered by the agreement. (Emp. Exh. 1, ¶ 4.) As to the identity of employers bound by the CEA Agreement, Article II, Paragraph 6 identifies such as being "[a]ll members of the Association for whom it holds bargaining rights and any person, firm, or corporation who, as an Employer, become signatory to this Agreement, shall be bound by all of its terms and conditions, as well as any future amendments which may be negotiated between the Association, and the Union[.]" (Id.) The CEA

Agreement then specifically provides that such employers "shall be bound to make Health and Welfare payments, Pension payments Apprenticeship fund payments . . . or *any other payment established by the appropriate Agreement*. (Id.) (Emphasis added.) In this manner, the CEA Agreement clearly and unambiguously identifies the bargaining unit as a multi-employer bargaining unit composing any building construction employer that has either signed the CEA Agreement or has assigned its bargaining rights to the CEA.

In conscious recognition of the temptation that employers often face to embrace profit motives over contractual obligations, each CEA Agreement, including the current one, has been crafted so as to discourage, if not outright avoid, instances where a signatory employer assigns the operation of equipment within Local 18's contractually negotiated work jurisdiction to someone other than an operating engineer. Under Paragraph 20, employers that elect to bind themselves to the CEA Agreement explicitly agree "that the work jurisdiction of the Operating Engineers, as assigned by the AFL-CIO, will be respected and all Operating Engineer work will be performed by an Operating Engineer[.]" (Id.) In order to provide substance to this obligation, Paragraph 21E of the CEA Agreement states that "[i]f the Employer assigns any piece of equipment to someone other than the Operating Engineer, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation." (Id.) In this manner, while the CEA Agreement's work preservation clause explicitly allows a signatory employer to assign work as it sees fit, it simultaneously creates an economic disincentive for a signatory employer to disregard Local 18's contractually-mandated craft jurisdiction.

CEA signatory contractors desirous of obtaining an employee to operate equipment covered by the CEA Agreement are required to utilize the Union's referral procedure. (*Donley's ULP*, GC Exh. 5, Article III; Emp. Exh. 1.) Local 18's referral system operates on a first-in-first-out basis. (Id.; *Donley's ULP*, TR 2105-2107.) Under these rules, employers desirous of obtaining the services of an Operating Engineer are required to call the Union's dispatcher at the district office covering the area where the work

is to be performed. (Id.) When making this call, employers must indicate the type of equipment to be operated along with any special requirements or certifications. (Id.) The dispatcher will move to unemployed Operating Engineers classified in Local 18's referral decks until a suitable applicant is found. (Id.) Once found, the applicant is referred to work for the requesting employer. Pursuant to this referral system, for decades and up until the present day, Local 18 members have operated forklifts and skid steers with a voluminous number of employers in Northeast Ohio, by virtue of over 2,000 work orders for such equipment. (*Donley's II*, TR 648-652; *Donley's ULP*, L18 Exhs. 180-186.) Local 18 has also received over 260 letters of assignment from the same employers for both full-time and intermittent operation of fork lifts and skid steers. (*Donley's III*, Jt. Exhs. 6-7; *Donley's ULP*, Attachment A: Assignment List Indeh.)

As with most industrial CBAs, the CEA Agreement also contains a mandatory grievance and arbitration procedure which covers any dispute that arises under the terms and conditions of the Agreement, including, but not limited to Paragraph 21. (Emp. Exh. 1, ¶¶ 113-115.) Local 18 has long utilized the grievance and arbitration procedure to process and resolve prior work preservation grievances arising under Paragraph 21 of the CEA Agreement with CEA signatory contractors, including, but not limited to: a grievance at a jobsite in Cleveland, Ohio with Independence (*Donley's II*, TR 109-110, 639-640, L18 Exh. 1), a grievance at a jobsite in Cleveland, Ohio with a construction company called Marous Brothers (*Donley's II*, TR 113-117, 641-642, L18 Exh. 2), and a grievance at a jobsite in Cleveland, Ohio with a construction company called Mr. Excavator (*Donley's II*, TR 117-121, 642-643, L18 Exh. 3.)

B. Local 18's AGC Agreement

By its own terms, the AGC Agreement specifically identifies the relevant bargaining unit. It does so by identifying: the geographic jurisdiction covered by the agreement; the type of work covered by the agreement; the identity of the employers covered by the agreement; the identity of employees covered by the agreement; and the type of work performed by those employees. (*Donley's ULP*, L18 Exh. 179.) Taken as a whole, these provisions provide a comprehensive framework that identifies the relevant

bargaining unit as a multi-employer bargaining unit encompassing all building construction employers working within a specific geographic region that have voluntarily bound themselves to the AGC Agreement. The AGC Agreement explicitly states that the employers bound to the agreement intend to become part of a "single multi-employer collective bargaining unit." (Id., Article II.) Taken as a whole, these provisions clearly provide for a multi-employer bargaining unit encompassing all building construction employers bound to the AGC Agreement.

In terms of the geographic region, the AGC Agreement applies to the "employment of and conditions under which employees shall work and rates of pay they shall receive on work in *Building Construction* in all counties in the State of Ohio except Ashtabula, Cuyahoga, Geauga, Lake, Colombiana, Mahoning and Trumbull, and including Boone, Campbell, Kenton and Pendleton counties in Kentucky." (*Donley's ULP*, L18 Exh. 179.) (Emphasis added). In terms of craft jurisdiction, the AGC Agreement also clearly and unambiguously identifies the work jurisdiction afforded to operating engineers under the Agreement. Specifically, Article II, Paragraph 10 provides "that all equipment for which classifications and wages have been established in this Agreement, and including that equipment for which classifications and wage rates may hereafter be established, shall be manned, when operated on the job site, by a member of the International Union of Operating Engineers, and paid the rates as specified in this Agreement." (*Donley's ULP*, L18 Exh. 179, Article II.) By referencing "all equipment for which classifications and wages have been established in this Agreement," the work jurisdiction allotted to Local 18 under Paragraph 10 is extended to include additional equipment specifically identified in the wage, pay, and classification provisions found in Article V, Article VI, and Exhibit A of the AGC Agreement. Included among the myriad of equipment listed in Article V, Article VI, and Exhibit A of the AGC Agreement are, *inter alia*, forklifts and skid-steers. (Id.)

Much like the CEA Agreement, in addition to establishing Local 18's traditional and recognized craft jurisdiction clauses, the mutual recognition clause serves an additional, yet critical purpose by identifying the multi-employer bargaining unit subject to the Agreement. The AGC Agreement's mutual

recognition clause further states that the Union is recognized as the "exclusive collective bargaining agent for all Employers of the Operating Engineers" within the relevant counties. (*Donley's ULP*, L18 Exh. 179, Article II.) The mutual recognition clause also provides that the term "Employer" and/or "Employers" means "persons, firms, corporations, joint ventures or other business entities bound by the terms of this Agreement[.]" (Id.) Immediately thereafter, the recognition clause specifically states that the "Employers and the Union by entering into this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement." (Id.) In sum, the terms and provisions contained within the AGC's mutual recognition clause clearly and unambiguously identify the bargaining unit as a multi-employer bargaining unit composing any building construction employer that has bound itself to the AGC Agreement.

And as with the CEA Agreement, Local 18's agreement with the AGC also contains specific provisions designed to preserve and protect the scope of work contractually afforded to Local 18 members under the AGC Agreement. (*Donley's ULP*, L18 Exh. 179, Article II.) Once again, the work preservation clause contained within the AGC is crafted so as to discourage, if not outright avoid, instances where an employer assigns the operation of equipment within Local 18's contractually negotiated work jurisdiction to someone other than an operating engineer. (Id.) Again, the deterrent to such behavior as agreed upon in the AGC Agreement is the imposition of an economic penalty. Specifically, under Paragraph 20, employers that elect to bind themselves to the AGC Agreement explicitly agree "that the work jurisdiction of the Operating Engineers, as assigned by the AFL-CIO, will be respected and all Operating Engineer work will be performed by an Operating Engineer[.]" (Id.) In order to provide substance to this obligation, Paragraph 22 mandates a specific economic sanction: "[i]f an Employer violates Paragraph 20, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wage and fringe benefits from the first day of the violation." (L18 Exh. 179, Article II.) As such, employers bound to the AGC Agreement are not prohibited from assigning work

covered by the AGC Agreement to someone other than an operating engineer. Rather, the AGC Agreement's work preservation clause explicitly allows a signatory employer to assign work as it sees fit so long as that employer is willing to pay any damages required under the terms of the parties' agreement.

AGC signatory contractors desirous of obtaining an employee to operate equipment covered by the AGC Agreement are required to utilize the Union's referral procedure. (*Donley's ULP*, L18 Exh. 179, Article II.) Local 18's referral system operates on a first-in-first-out basis. (*Donley's ULP*, L18 Exh. 179, Article III, TR 2105-2107.) Under these rules, employers desirous of obtaining the services of an Operating Engineer are required to call the Union's dispatcher at the district office covering the area where the work is to be performed. (Id.) When making this call, employers must indicate the type of equipment to be operated along with any special requirements or certifications. (Id.) The dispatcher will move to unemployed Operating Engineers classified in Local 18's referral decks until a suitable applicant is found. (Id.) Once found, the applicant is referred to work for the requesting employer. Pursuant to this referral system, for decades and up until the present day, Local 18 members have operated forklifts and skid steers with a voluminous number of employers in Northeast Ohio, by virtue of over 2,000 work orders for such equipment. (*Donley's II*, TR 648-652; *Donley's ULP*, L18 Exhs. 180-186.) Local 18 has also received over 260 letters of assignment from the same employers for both full-time and intermittent operation of fork lifts and skid steers. (*Donley's III*, Jt. Exhs. 6-7; *Donley's ULP*, Attachment A: Assignment List Index.)

As with most industrial CBAs, the AGC Agreement also contains a mandatory grievance and arbitration procedure which covers *any* dispute that arises under the terms and conditions of the Agreement, including, but not limited to Paragraph 20. (*Donley's ULP*, L18 Exh. 179, Article XIV.) Local 18 has consistently utilized the grievance and arbitration procedure to process and resolve prior work grievances arising under the successive AGC Agreements' work preservation provision with AGC signatory employers. Thus, in June of 2008, Local 18 documented an instance wherein Rudolph Libbe

Co. elected to assign the operation of a forklift to someone other than an operating engineer. (*Donley's ULP*, L18 Exh. 86F.) In response, Local 18 filed a written grievance with the employer that sought damages for the breach. Thereafter, the matter was settled when Rudolph Libbe, long signatory to the AGC Agreement (*Donley's ULP*, L18 Exh. 175B, 174M), agreed to pay a penalty in the form of a charitable donation the Hospice of Northwest Ohio. (*Donley's ULP*, TR 2267.) Similarly, in June of 2009, Local 18 documented an instance wherein G&L Corp., a signatory to the AGC Agreement (*Donley's ULP*, L18 Exh. 174A), elected to assign the operation of a forklift to someone other than an operating engineer. (*Donley's ULP*, L18 Exh. 86G.) Once again, the Union responded to this breach by filing a written grievance under the AGC Agreement and once again the matter was resolved after the parties negotiated a settlement whereby G&L Corp. agreed to pay a penalty in the form of a charitable donation to the Vera Bradley Foundation. (*Donley's ULP*, TR 2272.)

IV. Statement of Facts

A. Nerone

Nerone is an industrial contractor based in Cleveland, Ohio, and primarily operates throughout Northeast Ohio. Nerone is a signatory to the current CEA Agreement. (L18 Exh. 1, TR 112, 116-117.) As signatory, it enjoys the benefits of the bargain contained therein. Such benefits include, but are not limited to, the obtainment of operating engineers via usage of the Union's referral system. (Id.)

On or about July 30, 2014, Nerone was performing work at the Hilton Hotel project in Cleveland, Ohio ("Hilton Project") in its capacity as a subcontractor. (TR 122.) Specifically, Nerone was utilizing a skid steer with tracks at the Hilton project to, as the construction industry parlance provides, "stone pipe" at the job. (TR 172.) This process involves transporting stone product to a trench in order to serve as "bedding" for an underground pipe that would subsequently be placed in the trench. (TR 172-173.) Notably, pursuant to its work contract, Nerone was not required to do any mason tending at the jobsite. (TR 122.) On that same day, Local 18 documented an instance wherein Nerone elected to assign construction equipment properly within Local 18's contractually mandated craft jurisdiction to someone

other than a Local 18 member. Specifically, a Local 18 representative was visiting Nerone's jobsite at the Hilton Project, and documented an instance wherein Nerone assigned the operation of a skid steer to someone other than an operating engineer for the purpose of stoning pipe. (Emp. Exh. 4.) Pursuant to the provisions contained within the CEA Agreement, Local 18 sought to preserve its members' work by filing a work preservation grievance. (Id.) However, after nearly a month of attempts to resolve the matter, Nerone ultimately denied Local 18's grievance (L18 Exh. 3) and filed the instant ULP charges. (L18 Exh. 2.)

B. R.G. Smith

R.G. Smith is an industrial contractor based in Canton, Ohio, and primarily operates throughout the State of Ohio. R.G. Smith is a signatory to the current AGC Agreement. (TR 218.) As signatory, it enjoys the benefits of the bargain contained therein. Such benefits include, but are not limited to the obtainment of operating engineers via usage of the Union's referral system. (TR 219-220.)

On or about November 3, 2014, R.G. Smith was performing work at the Foltz Industrial Parkway Project in Strongsville, Ohio ("Foltz Project"). Specifically, R.G. Smith was constructing the foundation of the on-site building, as well as performing all steel fabrication, sheeting, and erection of the on-site building. (TR 320.) In so doing, the Employer was utilizing forklifts to supply materials pursuant to this construction. (TR 321.) On that same day, Local 18 documented an instance wherein R.G Smith elected to assign construction equipment properly within Local 18's contractually mandated craft jurisdiction to someone other than a Local 18 member. Specifically, a Local 18 representative was visiting R.G. Smith's jobsite at the Foltz Project, and documented an instance wherein R.G. Smith assigned the operation of a forklift to someone other than an operating engineer for the purpose of constructing the on-site building at the Foltz Project. (Emp. Exh. 8.) Pursuant to the provisions contained within the AGC Agreement, Local 18 sought to preserve its members' work by filing a work preservation grievance. (Id.) However, after nearly two months of attempts to resolve the matter, R.G. Smith filed the instant ULP charges.

V. Statement of Case

On August 22, 2014 Nerone filed ULP charges only alleging that Local 18 and LIUNA 310 "egnaged [sic] in and induced individuals to engage in a strike or refusal to perform services, and/or threatened, coerced, or restrained the Charging Party, where the object is and was to force or require the Charging Party to assign forklift work and related work to employees who are members of the Charged Party." ("Nerone Case.") The charges did not identify the jobsite nor the scope of the equipment at issue. On October 29, 2014, Nerone filed amended ULP charges which identified the jobsite as the Hilton Project and the equipment at issue as forklifts and skid steers. On October 30, 2014, the Region issued an Order Consolidating Cases and Notice of Hearing, notifying the parties that it was consolidating Nerone's ULP charges against LIUNA 310 and Local L18, as well as exercising its authority under Section 10(k) of the Act to conduct a hearing on November 18, 2014 concerning the jurisdictional dispute alleged in Nerone's ULP charges. The Notice identified the specific work at issue to be "[t]he operation of forklifts, bobcats and/or skidsteer loader with any and all attachments used at the Hilton Hotel construction site in downtown Cleveland, Ohio." Subsequently, the Region issued an Order Rescheduling Hearing on November 12, 2014, hearing date for January 7, 2015.

On December 23, 2014, R.G. Smith filed ULP charges alleging that Local 18 and LIUNA 310 "engaged in and induced individuals to engage in a strike or refusal to perform services, and/or threatened, coerced, or restrained the Charging Party, where the object is and was to force or require the Charging Party to assign forklift work and related work to employees who are members of the Charged Party[.]" ("R.G. Smith Case.") The charges identified the jobsite as the Foltz Project, and identified forklifts and skid steers as the equipment at issue.

On December 29, 2014, before the Region, Nerone and LIUNA 310 jointly moved that the hearing in the Nerone Case be postponed indefinitely until it could be consolidated with the R.G. Smith Case. While Local 18 did not oppose this Motion for Postponement and Consolidation, it made clear that its lack of opposition did not constitute an agreement that the Nerone Case should or would be

consolidated with the R.G. Smith Case, and further reserved its right to contest any determination by the Region regarding such consolidation. Region 8 acquiesced to the Motion for Postponement and Consolidation on January 5, 2015, but did so in a very particular manner. Rather than indefinitely postponing the hearing until consolidation, the Region issued an Order Rescheduling Hearing for the Nerone Case *only* to February 9, 2015. Further, the Region did *not* consolidate the Nerone and R.G. Smith Cases in that Order.

On the afternoon of January 29, 2015, Local 18 was served with the Region's Order Further Consolidating Cases and Notice of Hearing. Pursuant to this Order and Notice, a hearing under Section 10(k) in the Nerone and R.G. Smith Cases was scheduled to open on February 9, 2015. In addition to consolidating the Nerone Case and R.G. Smith Case, the Region's January 29 Order Further Consolidating Cases also greatly expanded upon the scope of the dispute as alleged in the charges filed by Nerone and R.G. Smith. Specifically, pursuant to the Order, the scope of the hearing under Section 10(k) was to include "[w]hether an area-wide award is appropriate, and if so, (1) whether it should only cover similar work done by the Employer-parties to all instant cases or whether it should cover similar work being done by all employers and (2) the geographical scope of the area-wide award." On February 12, 2015, the Board issued an Order and Notice of Hearing, rescheduling the instant hearing for March 26, 2015. ("February 12 Order.")

VI. Law and Analysis

There are two essential grounds which demonstrate that the Region February 12 Order should be quashed. First, the proceedings by the Region and the Charging Parties, up and through the instant Section 10(k) hearing, caused Local 18 to be denied its substantive and procedural due process rights. Second, there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. While viewing the evidence in its entirety, it is clear that there are no competing claims for work, nor has Local 18 engaged in proscribed conduct. Rather, under established Board jurisprudence, the Union is simply attempting to preserve work which its members have historically performed for the multi-

employer bargaining unit, including, *inter alia*, Nerone and R.G. Smith, under the CEA and AGC Agreements, respectively. Accordingly, this matter is not amenable to the Board's jurisdiction under Section 10(k) and should therefore by quashed.

A. The Region's February 12 Order Should be Quashed Because Local 18 Was Denied its Substantive and Procedural Due Process Rights.

The process utilized by the Region in scheduling a hearing in this case is procedurally and substantively flawed. First, in issuing its February 12 Order, the Region acted without jurisdiction under Section 10(b) of the Act by originating a complaint upon his own initiative. Indeed, the broad description of the hearing's scope encompasses a plethora of factual and legal issues that were not alleged, cited, or related to any of the charges giving rise to the present hearing. Specifically, the Order in this case goes well outside the discreet disputes alleged in the charges filed by R.G. Smith and Nerone to include an amorphous dispute between Local 18 and unknown entities that is cryptically identified as "all employers" performing "similar work." Second, in addition to impermissibly exceeding the scope of the allegations contained within the underlying charges filed in this matter, the Region's Order contains insufficient facts to afford Local 18 appropriate substantive and procedural due process for the purpose of presenting its arguments. Indeed, by cryptically identifying the issues to be determined to include a dispute between Local 18 and unknown entities that are mysteriously identified as "all employers" performing "similar work," the Region's Order failed to identify, let alone specify, the legal, procedural, and factual issues encompassed within the greatly increased scope of the consolidated hearing. In sum, Region 8's February 12 Order and Notice of Hearing should be quashed because Local 18 was deprived of its substantive and procedural due process rights.

1. *The February 12 Order Should Be Quashed As The Region Acted Without Jurisdiction Under Section 10(b) of the Act by Originating a Complaint Upon His Own Initiative.*

Section 10(b) of the Act provides: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect[.]" This section of the Act has been

declared to perform two separate yet equally important functions. *Ross Stores v. NLRB*, 235 F.3d 669, 677 (D.C. Cir.2001) (Randolph, J., concurring). Section 10(b):

> "'sets down a condition for the Board's exercise of jurisdiction,' namely, that the Board, which here acts through the General Counsel, may investigate and prosecute conduct only in response to the filing of a 'charge,' that is, a formal allegation made (by a union, an employer, or an employee) against a union or an employer. Second, § 10(b) 'functions much like a statute of limitations,' restricting the proper subject of any complaint issued by the General Counsel to conduct about which a charge was filed within six months of its occurrence."

Precision Concrete v. NLRB, 334 F.3d 88, 90 (D.C. Cir.2003), quoting *Ross Stores*, 235 F.3d at 677. As such, the Board has long conceded that Section 10(b) of the Act "obliges it to await a charge before it may initiate an investigation or issue a complaint." *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 278 (D.C. Cir.1988). Section 10(b) therefore circumscribes the Board's power so that "when the Board ventures outside the strict confines of the charge, it must limit itself to matters sharing a significant factual affiliation with the activity alleged in the charge." *Id.*, at 280 (citations omitted). *Accord Lotus Suites v. NLRB*, 32 F.3d 588, 591 (D.C. Cir.1994).

In *Redd-I, Inc.*, the Board adopted a three-part test in order to determine whether uncharged allegations contained within a complaint are so closely related as to permit litigation of both sets of allegations before the Board. 290 NLRB 1115, 1118 (1988). While this test was originally developed with the Section 10(b)'s statute of limitations in mind (in that the uncharged allegations were also untimely) it has been expanded to include any allegations presented by the Board that appear to be factually unrelated to those in the charge. *Precision*, 334 F.3d at 92. *Accord Nickles Bakery of Indiana, Inc.*, 296 NLRB 927, 928 (1989). The touchstone of the *Redd-I* test is whether the charges as described by the Board are similar enough to the ULP charges such that they share a "significant factual affiliation." *G.W. Galloway Co.*, 835 F.2d at 280. *See also NLRB v. Fant*, 360 U.S. 301, 309, 79 S.Ct. 1179, 3 L.Ed.2d 1243 (1959). Under the *Redd-I, Inc.* test, the Board will look to (1) whether the uncharged allegations involve the same legal theory as the allegations in the charge; (2) whether the uncharged allegations arise from the same factual circumstances or sequence of events as the charged

allegations; and (3) whether a respondent would raise similar defenses to both the charged allegations and the uncharged allegations. *Id.* A challenge to the Board's authority to hear and address allegations not raised by a charge constitutes a direct challenge the Board's jurisdiction. *Precision Concrete,* 334 F.3d at 91. As such, "it is incumbent upon the Board to establish its authority to act, at least once its jurisdiction has been put in issue." *Id*. *See Lotus Suites, Inc. v. NLRB,* 32 F.3d at 592 ("Because the Board has failed to (nor could it) establish a sufficient factual connection between the general terms of the charge and the specific allegations of the complaint, the Board's order must be set aside"). *See also Drug Plastics & Glass Co., Inc. v. NLRB,* 44 F.3d 1017, 1022 (D.C.Cir.1995) ("Where the Board is unable to connect the allegations in its complaint with the charge allegation, we are unable to find that the Board has jurisdiction over the unrelated complaint allegations"). The burden is therefore upon the Board to establish its jurisdiction by demonstrating that the uncharged allegations contained within the February 12 Order involve the same legal theory, arise from the same factual circumstances or sequence of events, and invoke similar defenses as the ULP charges.

The facts presented by this case, however, do not support a finding that the uncharged allegations contained within the Region's February 12 Order are so closely related as to share a significant affiliation with the charges filed by Nerone and R.G. Smith. As to the issues of same legal theory and defenses, the charges filed by Nerone and R.G. Smith specifically allege that a jurisdictional dispute as defined by Section 8(b)(4)(d) is taking place between LIUNA 310 and Local 18 with regard to the operation of forklifts at two specific locations; to wit, the Hilton Project and the Foltz Project. Meanwhile, that portion of the February 12 Order addressing an amorphous dispute between Local 18 and unknown entities that is cryptically identified as "all employers" performing "similar work" utterly fails to identify the specific employers involved or the location of the jobsite where the dispute is taking place. At best, the only relation between the uncharged and charged allegations is that both assert a violation of Section 8(b)(4)(D). That fact alone, however, does not establish a shared legal theory. *Brockton Hosp. v. NLRB,* 294 F.3d 100, 108 (D.C.Cir.2002), *rev'd on other grounds,* No. 01-1219, 2002 U.S. App. LEXIS 16521

(D.C.Cir.2002). Rather, in order to be closely related in legal theory, both the charged and uncharged allegations must share a specific and identical legal basis. *Id.* In this case, the failure on the part of the Region to identify the entities constituting "all employers" performing "similar work" necessarily precludes a finding that the charged allegations regarding the jurisdictional dispute allegedly taking place between Local 18 and LIUNA 310 at the Hilton Project or Foltz Project share a specific and identical legal basis with the uncharged allegations.

Turning to the question of whether the charged and uncharged allegations arise from the same factual circumstances or sequence of events, the fact that the charged and uncharged allegations are temporally related does not in and of itself establish an identical factual circumstances or sequence of events. *E.g., G.W. Galloway Co.*, 856 F.2d at 280-81 (allegations one day apart not factually linked). *Accord Ross Stores*, 235 F.3d at 674 (coincidence of two separate violations during the same organizing campaign does not of itself create a close factual relationship). Rather, the evidence in this matter clearly indicates that the charged and uncharged allegations each address entirely separate and distinct job locations, labor organizations, and collective bargaining agreements. On the one hand, the charges filed by Nerone and R.G. Smith specifically allege that a jurisdictional dispute as defined by Section 8(b)(4)(d) is taking place between LIUNA 310 and Local 18 with regard to the operation of forklifts at two specific locations. On the other hand, the Region has presented an uncharged allegation addressing an amorphous dispute between Local 18 and unknown entities that is cryptically identified as "all employers" performing "similar work." In so doing, the Region utterly fails to identify the conduct allegedly proscribed by the Act, the specific employers involved, or the location of the jobsite where the dispute is taking place. Thus, there is no way to determine whether the charged and uncharged allegations arise from the same factual circumstances or sequence of events. Given this fact, it cannot be said that the Region's uncharged allegations arise from the same factual circumstances or sequence of events as the allegations contained within the charges filed by Nerone and R.G. Smith.

Clearly, the Region's February 12 Order exceed the scope of the charged allegations by including therein matters related to unknown entities that are only identified as "all employers" performing "similar work." More importantly, the uncharged allegations contained within the Region's February 12 Order cannot be said to share a significant affiliation with the allegations contained in the ULP charges filed by Nerone and R.G. Smith. Accordingly, the Region's February 12 Order should be quashed as the Region acted without jurisdiction under Section 10(b) by originating a complaint upon its own initiative.

2. The Region's February 12 Order Should be Quashed Because it Contains Insufficient Facts to Afford Local 18 Appropriate Procedural Due Process for the Purpose of Presenting its Arguments.

Pursuant to Section 102.90 of the Board's Rules and Regulations, if the Region believes that a ULP charge alleging violations of Section 8(b)(4)(D) has merit and the parties to the dispute have not submitted proper evidence of voluntary adjustment of such a dispute, the Region will serve a notice of hearing pursuant to Section 10(k) of the Act on all the parties. This notice must contain, pursuant to Section 102.90, a "statement of the issues involved." Such a statement must comport with notions of fairness, as "[d]ue process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense." *KenMor Electric Co*., 355 NLRB 1024, 1029 (2010). *Accord Earthgrains Co.*, 351 NLRB 733, 735 (2007). The factual requirements of a complaint issued by a Region in an unfair labor practice proceeding may be reasonably said to guide the requirements of a notice of hearing. Thus, the requirements that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including . . . the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed," *Soule Glass & Glazing Party Co. v. NLRB*, 652 F.2d 1055, 1073-1074 (1st Cir.1981), are also binding on a notice of hearing. Indeed, the requisite subject matter "is designed to notify the adverse party of claims to be adjudicated so he may prepare his case, and sets the standard of relevance at the hearing before the ALJ." *Id*.

The requirement to comport with procedural due process in Board hearings and adjudications is hardly a novel concept. Federal courts have long-recognized that in complex cases before the Board involving multiple charges based on a variety of occurrences, "[f]ailure to clearly define the issues and advise . . . [a party] charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." *NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267, 274-275 (10th Cir.1980), *quoting J.C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir.1967). "In short, the 'charge' must allege the unfair labor practice to invoke the jurisdiction of the Board; and, by way of limitation, the complaint issued by the Board must deal with the same subject matter and sequence of events . . ." *Douds v. Internatl. Longshoremen's Assn., Independent*, 241 F.2d 278, 284 (2nd Cir.1957).

The Region's February 12 Order has failed to comport with these elementary requirements of due process. The test for evaluating a due process violation is one of "fairness" under the circumstances of each case in determining whether the party aggrieved by the due process violation "knew what conduct was in issue and had a fair opportunity to present his . . . [argument]." *Soule Glass & Glazing Party Co*., 652 F.2d at 1073-1074. If the aggrieved party could not know of the operative conduct, there are multiple allegations and the legal elements do not substantially overlap, it is "fair to say" the aggrieved party would be unable to have a fair opportunity to present his argument. *Id*. In the present matter, Local 18 was not afforded any meaningful semblance of due process, as the Region failed to identify, let alone specify, the legal and procedural issues encompassed within the greatly expanded scope of the consolidated Nerone and R.G. Smith 10(k) hearing. Indeed, there is no way for Local 18 to prepare for the legal and procedural requirements implicated in a Section 10(k) hearing when the only notice afforded to Local 18 regarding the purported jurisdictional dispute amorphously cites to a dispute between Local 18 and unknown entities that are cryptically identified as "all employers" performing "similar work." Similarly, the Region's failure to identify the involved parties and operative conduct at issue in this case denies Local 18 the opportunity to know the relevant factual and evidentiary issues to

be determined during the hearing. Such issues include what constitutes "similar work" and what constitutes "all employers." As it presently stands, Local 18 was left to guess as to what entities constitute similar employers and what constitutes similar work.

In accordance with the "fairness" test elucidated by *Soule Glass & Glazing Party Co.*, the Region's February 12 Order patently denies Local 18's procedural due process rights because the Region's identification, such that it is, of the scope of hearing, precluded the Union from determining the critical factual, evidentiary, and legal concerns which govern the present matter.

3. *The Region's February 12 Order Should be Quashed Because the Charging Parties' ULP Charges are Patently Inconsistent With the Equipment in Dispute as Determined in the Section 10(k) Hearing.*

Despite allegations to the contrary, there is no evidence of any dispute between Local 18 and Nerone concerning the operation of forklifts, nor is there any evidence of any dispute between Local 18 and R.G. Smith concerning the operation of skid steers. Thus, while the ULP filed by Nerone listed both forklifts and skid steers as equipment at issue, the Employer's President, Tom Nerone, agreed that Local 18 never filed a grievance with Nerone at the Hilton project, or any other location, concerning the operation of forklifts. (TR 126.) Ultimately, Nerone stated that there was no jurisdictional dispute with Local 18 over the operation of forklifts. (TR 140.) And notably, Nerone readily agreed that Local 18's grievance did not request a change of assignment in the skid steer work performed at the Hilton project (TR 126), but simply constituted a request, pursuant to the CEA Agreement's work preservation clause, of payment of damages as a remedy for the Union's grievance. (TR 140.) Indeed, Nerone's President, Tom Nerone, could not identify any direct contact with Local 18 where its Hilton Project grievance was discussed in terms of anything other than the Union's attempt to maintain its contractual work preservation objective under the CEA Agreement. (TR 131.)

Likewise, the ULP filed by R.G. Smith listed both forklifts and skid steers as equipment at issue, the Employer's Chief Operating Officer, Geoffrey Nicley, agreed that Local 18 never filed a grievance with R.G. Smith at the Foltz Project concerning the operation of skid steers. (TR 256.) Ultimately, R.G.

Smith' stated that there was no jurisdictional dispute with Local 18 over the operation of forklifts. (TR 274.) And notably, Mr. Nicely readily agreed that Local 18's grievance did not requests a change of assignment in the forklift work performed at the Foltz project, but simply constituted a request, pursuant to the CEA Agreement's work preservation clause, of a payment of damages as a remedy for the Union's grievance. (TR 256-257.) Indeed, R.G. Smith even initially offered to reassign some work involving the Ironworkers, a non-party union, but Local 18 emphasized that its grievance and desired remedy was purely a request for damages, not reassignment. (TR 257.)

Based upon the foregoing, it is clear that the Employers' ULP charges, which listed both skid steers *and* forklifts as the equipment at issue were intentionally misleading and manifestly inaccurate. Local 18 was required to prepare its arguments and evidence on the basis of, in significant part, ultimately toothless ULP charges. As such, the Union's procedural due process rights were materially prejudiced.

B. The Regional Director's February 12 Order Should be Quashed Because No Reasonable Cause Exists to Believe that Section 8(b)(4)(D) of the Act Has been Violated.

Before the Board may proceed with a determination of a dispute pursuant to Sec. 10(k) of the Act, it must first be satisfied that reasonable cause exists to believe that Sec. 8(b)(4)(D) has been violated. *Laborers Dist. Council (Capitol Drilling Supplies, Inc.)*, 318 NLRB 809, 810 (1995). This determination requires a finding that there is reasonable cause to believe that: (1) a party has used proscribed means to enforce its claims to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001). The factual predicate for asserting a colorable Section 10(k) dispute is therefore found when an employer faces a proscribed means of enforcing a claim to disputed work as a result of a jurisdictional dispute that is not of his own making and in which he has no interest. *Internatl. Longshormen's & Warehousemen's Union Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C.Cir.1986). When examining evidence proffered to satisfy

the "reasonable cause" standard, evidence must be "viewed in its entirety" and the Region must do so by looking at the "specific language used and surrounding conduct and events." *Bricklayers Local 20 (Altounian Builders, Inc.)*, 338 NLRB 1100, 1101 (2003).

Despite the allegations levied by the Charging Parties, these matters do not concern rival unions, each making a claim to an innocent employer for the assignment of work. Rather, LIUNA 310, R.G. Smith, and Nerone have colluded to manipulate the provisions of the in order to use Section 10(k) proceedings as a tool to bypass the duly negotiated work preservation clause contained within Local 18's CBAs. However, under established principles of Board jurisprudence, a union's enforcement of a work preservation clause is not within the aegis of the Board's jurisdiction.

1. The Purpose of a Valid Work Preservation Objective.

Collective bargaining is an effort to erect a system of industrial self-government utilizing agreed-upon rules of law which seeks to avoid leaving "matters subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *Warrior & Gulf*, 363 U.S. at 580-581. As such, it has long been federal policy to promote industrial stabilization through the voluntary use of the collective bargaining process. Federal labor policy encourages the grievance-arbitration procedure as the preferred method of resolving labor-management disputes arising under collective bargaining agreements. *Id*. Accord *ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 93 (1988). Congressional support of this policy is clearly set forth in Section 203(d) of the Act, which states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

In *AT&T Technologies v. Communications Workers*, the Supreme Court reaffirmed the preferred status of labor arbitration stating that contract provisions that call for arbitration of labor disputes "have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes, arising during the term of a

collective-bargaining agreement." 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *See also United Paperworkers Internatl. Union v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 89 L.Ed.2d 286 (1987). With this policy in mind, the Board has determined that it is oftentimes prudent to refrain from exercising its authority to adjudicate alleged unfair labor practices in order to facilitate private dispute resolution under the grievance-arbitration process. *E.g., United Technologies Corp.*, 268 NLRB 557 (1984); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). To this end, the Board has adopted the Supreme Court's premise in *Carey v. Westinghouse Corp.*, that the grievance and arbitration process has a major role to play in settling jurisdictional disputes. Specifically, the Board stated that:

> "The [Supreme] Court held in Carey that prior to a Board 10(k) award, a union involved in a jurisdictional dispute may file a contractual grievance, pursue it to arbitration, and seek to enforce an arbitration award under Section 301. The Court stated that the 'underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process'; that '[g]rievance arbitration is [a common] method of settling disputes over work assignments'; and that '[s]ince § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.'"

ILWU Local 7 (Georgia-Pacific Corp.), 291 NLRB at 93, quoting *Carey*, 375 U.S. at 265-266. The Board's position in *Georgia-Pacific Corp.* is not only in accordance with federal policy embracing the role that arbitration plays in resolving disputes arising under labor agreements, but is also consonant with the legislative history of Section 10(k) itself.

In discussing the merits and liabilities of the then-proposed LMRA Bill S.1126, Senator Thomas stated that "[w]e are confident that the mere threat of governmental action [via Board action under Section 10(k)] will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such [jurisdictional] controversies within their own ranks, where they should properly be settled." S. Min. Rep. No. 105., 80th Cong., 1st Sess., I Leg. Hist. 480-481 (LMRA 1947). Similarly, Senator Taft, co-sponsor of the LMRA, stated that the "desired objectives" of enacting, *inter alia*, Section 10(k) of the LMRA were "prompt elimination of the obstructions to the free flow of

commerce and encouragement of the practice and procedure of free and private collective bargaining." S. Rep. No. 245, 80th Cong., 1st Sess., I Legislative History of the Labor Management Relations Act ("Leg. Hist.") 414 (LMRA 1947). In this manner, the Board's policy for promoting valid work preservation clauses because they are key components to maintaining "industrial peace," *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB 1018, 1020 (2005), *enfd.* 253 Fed. Appx. 625 (9th Cir.2007), dovetails with the Congressional policy that favors arbitration rather than Board resolution of labor disputes in cases that technically appear to be Section 10(k) disputes, but are in fact work preservation disputes at heart. *See, e.g., USCP-WESCO, Inc. v. NLRB*, 827 F.2d 581, 586 (9th Cir.1987).

For its part, arbitral jurisprudence has also long recognized the utility of contractually negotiated work preservation clauses. Indeed, it is now a fundamental principle in arbitration that "[p]reservation of work contractually entitled to members of a bargaining unit is central to most collective bargaining agreements." *E.g., Franklin Cty. Bd.*, 127 LA 1537, 1540 (Van Kalker, 2010); *Rolls-Royce Energy Sys.*, 128 LA 1089, 1091 (Van Kalker, 2011). Indeed, "[t]he protection and preservation of the unit work is the fundamental economic benefit obtained by the Union in collective bargaining." *City of Hamilton*, 123 LA 932, 935 (Goldberg, 2006). As Arbitrator Wallen artfully put it:

> Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul . . . . The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore as one of the contract's basic purposes.

New Britain Mach. Co., 8 LA 720, 722 (Wallen, 1947). As such, a work preservation clause "guarantees to the union bargaining unit work for the duration of the contract term." *Brookfield-LaGrange Park Bd. of Edn.*, 93 LA 353, 357 (Nathan, 1989). To this end, the collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant. *Warrior & Gulf*, 363 U.S. at 578-579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well

as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments. *Id.*

Where the language of the work preservation clause indicates that it seeks the preservation of work that is traditionally performed by the union's members and within their "legitimate expectation[s]", the work preservation clause is justified even if there is not an actual threat of job loss. *See Painters Dist. Council 51*, 321 NLRB at 165-166. *Accord Mine Workers (UMW) (Dixie Mining Co.)*, 188 NLRB 753, 754 (1971) (Board has found a valid work preservation clause where the union attempts to protect and preserve unit jobs by imposing a financial penalty on the employer, thus removing economic incentive to divert work to a cheaper workforce). More specifically, when a work preservation clause defines work to be performed by the unit employees, does not impose legally cognizable obligations on third parties, does not regulate the labor policies of third parties or non-unit employees, and is only used in the context of disputes between the contracting employer and union, the "clause represents a genuine effort to preserve the work of employees in the contract unit" represented by the union. *Plumbers & Pipefitters Union (American Boiler Mfrs. Assn.)*, 154 NLRB 285, 295 (1965) (Member Brown, dissenting).

Here, there is no question that Local 18 has previously enforced its work preservation objectives with other employer-members of the multi-employer bargaining unit within the CEA and/or AGC. It has done so with Rudolph Libbe Co., a longtime signatory to the AGC Agreement, in June of 2008, where the employer agreed to pay damages due to a breach of the AGC Agreement's work preservation clause. (*Donley's ULP*, L18 Exh. 86F, TR 2267.) The Union has also done so with G&L Corp., a signatory to the AGC Agreement, in June of 2009, where the employer agreed to pay damages due to a breach of the AGC Agreement's work preservation clause. (*Donley's ULP*, L18 Exh. 86G, TR 2272.) And most significantly, R.G. Smith recognized Local 18's work preservation clause when it agreed in April of 2013 to pay contractual damages pursuant to the AGC Agreement's work preservation clause when Local 18 alleged that the Employer failed to employ operating engineers on a forklift for a jobsite within the Union's geographical jurisdiction. (TR 237-238; L18 Exh. 5.) Unsurprisingly, R.G. Smith's Chief

Operating Officer, Geoffrey Nicely, stated he was well-aware that Local 18's craft jurisdiction under the AGC Agreement includes forklifts and skid steers, as well as a work preservation clause. (TR 231.)

Likewise, Local 18 has long utilized the grievance and arbitration procedure to process and resolve prior work preservation grievances arising under Paragraph 21 of the CEA Agreement with CEA signatory contractors, including, but not limited to: a grievance at a jobsite in Cleveland, Ohio with Independence (*Donley's II*, TR 109-110, 639-640, L18 Exh. 1), a grievance at a jobsite in Cleveland, Ohio with a construction company called Marous Brothers (*Donley's II*, TR 113-117, 641-642, L18 Exh. 2), and a grievance at a jobsite in Cleveland, Ohio with a construction company called Mr. Excavator (*Donley's II*, TR 117-121, 642-643, L18 Exh. 3.)

2. Establishing a Valid Work Preservation Objective.

The establishment of a successful work preservation defense requires a finding that the work at issue has been "traditionally performed by employees represented by the [respondent] union." *NLRB v. Internatl. Longshoremen's Assn.*, 447 U.S. 490, 504-505, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980) ("*ILA I*"). In making such a finding, the scope of the bargaining unit must first be determined. *See, e.g., Food & Commercial Workers Local 367 (Quality Food Centers)*, 333 NLRB 771, 772 (2001), quoting *Newspapers & Mail Deliverers (Hudson News)*, 298 NLRB 564, 566 (1990) (respondent union's "work preservation defense must be analyzed in light of the 'traditional scope of the bargaining unit's work'"). Subsequently, it must be established by the union asserting its work preservation objective under the bargaining unit that the work at issue – here, forklift and skid steer work – is fairly claimable by the union. *American President Lines, Ltd. v. ILWU*, 997 F.Supp.2d 1037, 1046 (D.Ala.2014).

a. The Appropriate Bargaining Unit is a Multi-Employer Bargaining Unit.

The scope of the bargaining unit is assessed by a review of the "contractual recognition clause and the history of the parties' conduct under it." *E.g., Newspaper & Mail Deliverers*, 298 NLRB at 556. *Accord Natl. Maritime Union (Commerce Tankers Corp.)*, 196 NLRB 1100, 1101 (1972), *enfd.*, 486 F.2d 907 (2nd Cir.1973) (determining whether appropriate bargaining unit is single-employer, or a

multiemployer or industrywide unit). *See also ILA (Greenwich Terminals) Advice Memo*, Case No. 04-CC-123452 (July 15, 2014) (where appropriate bargaining unit is multi-employer, such a unit is appropriate for jurisdictional dispute adjudications). Here, both the CEA Agreement's and the AGC Agreement's contractual recognition clause specifically identify the appropriate unit as being a multi-employer unit composing any and all contractors that elect to be bound to the Agreements' terms.

To begin, both the AGC Agreement and the CEA Agreement identify a specific geographic scope. Both agreements further specifically define the type of work covered within that geographic scope to include "building work." Both Agreements also specify that the Union is recognized as the bargaining representative for all operating engineers performing building work within the specified geographic area while the AGC and the CEA are specifically recognized as the bargaining representatives for all employers of those operating engineers. In terms of employers covered by the Agreements, the AGC Agreement defines such as "persons, firms, corporations, joint ventures or other business entities bound by the terms of this Agreement[.]" (*Donley's ULP*, L18 Exh. 179, Article II; Emp. Exh. 1, ¶ 4.) For its part, the CEA Agreement specifies that covered employers include "[a]ll members of the Association for whom it holds bargaining rights and any person, firm, or corporation who, as an Employer, becomes signatory to this Agreement, shall be bound by all of its terms and conditions, as well as any future amendments which may be negotiated between the Association, and the Union[.]" (*Donley's ULP*, GC Exh. 5, Article II; Emp. Exh. 1.)

Both the AGC Agreement and the CEA Agreement also include language specifying the scope of the bargaining unit to include all employers as a collective as opposed to each employer as an individual. That is, Nerone and R.G. Smith belong to their respective multi-employer bargaining units in the CEA and AGC Agreements, such that the work of operating engineers in that unit is determinative of Local 18's work preservation claim. To this end, the AGC Agreement's mutual recognition explicitly states that the "Employers and the Union by entering into this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement

shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement." (*Donley's ULP*, L18 Exh. 179, Article II.) Similarly, the CEA Agreement also specifically calls for a multi-employer bargaining unit. To this end, the Article II, Paragraph 6 of the CEA Agreement identifies the Association as being the sole representative of a group of employers composing: "[a]ll members of the Association for whom it holds bargaining rights and any person, firm, or corporation who, as an Employer, become signatory to this Agreement, shall be bound by all of its terms and conditions, as well as any future amendments which may be negotiated between the Association, and the Union[.]" (*Donley's ULP*, GC Exh. 5; Emp. Exh. 1.)

Presently, the scope of that multi-bargaining unit composes hundreds of different contractors. As it pertains to the AGC Agreement: no fewer than one-hundred and seventy-four (174) building construction contractors are bound to the AGC Agreement set to expire in 2017 (*Donley's ULP*, L18 Exh. 172A-D); no fewer than two-hundred and three (203) building construction contractors were bound to the AGC Agreement that expired in 2013 (*Donley's ULP*, L18 Exh. 173A-E); and no fewer than six-hundred and thirty-eight (638) building construction contractors were bound to the AGC Agreement that expired in 2010 (*Donley's ULP*, L18 Exh. 174A-P.) In terms of the CEA Agreement: no fewer than fifty-one (51) different building construction employers were bound to the CEA Agreement set to expire in 2015 (*Donley's ULP*, L18 Exh. 171 A-C); no fewer than eighty-nine (89) different building construction employers were bound to the CEA Agreement that expired in 2012 (*Donley's ULP*, L18 Exh. 171D-F); and no fewer than thirty (30) different building construction employers were bound to the CEA Agreement that expired in 2009 (*Donley's ULP*, L18 Exh. 171G-H.)

Thus, in *ILA (Greenwich Terminals) Advice Memo*, Case No. 04-CC-123452 (July 15, 2014), the General Counsel found, utilizing the proper bargaining unit scope analysis, that the appropriate scope was a multi-site unit, which bolstered the respondent union's work preservation argument in a Section 8(b)(4) charge filed in Region 4. *Id*. at *7-13. This decision critically held that a Section 10(k) decision by the Board involving the same parties was not binding on a subsequent Section 8(b)(4) proceeding

because the Board's underlying Section 10(k) decision because did not properly "consider or determine the scope" of the multi-employer bargaining unit in light of the work preservation defense raised by the respondent union. *Id*. at *13. After applying the proper analysis, the General Counsel determined that the appropriate unit for determining the validity of the union's work preservation claim was a multi-employer, coast-wide unit. *Id*. at *9. The General Counsel further found that when viewed in light of this coast-wide unit, the union's work preservation claim had merit. *Id*. at *16.

In sum, the terms and provisions contained within the AGC and CEA Agreements clearly and unambiguously identify the bargaining unit as a multi-employer bargaining unit composing any building construction employer that has bound itself to either the AGC Agreement or the CEA Agreement. Because the language of both agreements not only defines the bargaining unit but also the primary employment relationship on a multi-employer basis, a multi-employer bargaining unit determination is not only appropriate, but mandatory. *ILWU Local 4 (Kinder Morgan Terminals)*, Case No. 19-CC-092816, 2014 NLRB LEXIS 632 (Aug. 13, 2014); *ILA (Greenwich Terminals) Advice Memo*, Case No. 04-CC-123452, *7-13 (July 15, 2014); *Bermuda Container Lines, Ltd. v. Internatl. Longshoremen's Assn.*, 192 F.3d 250, 257 (2nd Cir.1999). As such, the relevant bargaining unit for assessing whether Local 18's grievances have a lawful work preservation objective transcends any particular single employer-employee group and includes within its scope a multi-employer association composed of any and all employers that have bound themselves to the AGC Agreement and/or the CEA Agreement. *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 675 (1972), fn. 10.

b. Forklift and Skid Steer Work is Fairly Claimable by Local 18.

Having established that a multi-employer association composed of any and all employers that have bound themselves to the AGC Agreement and/or the CEA Agreement is the appropriate unit for assessing Local 18's work preservation claim, the critical inquiry now turns to whether operating engineers have a history of performing forklift and skid-steer work within that unit. Here, there is no doubt that the Charging Parties have consistently utilized operating engineers on forklifts and skid steers

pursuant to the CEA and AGC Agreements. Regardless, whether operating engineers have or have not performed forklift and/or skid steer work at a particular site for a particular employer within the multi-employer unit is not controlling. Instead the Board "must look to the work done by the bargaining unit employees as a whole and not with reference to the particular employment practices of an individual employer." *American President Lines, Ltd.*, 997 F.Supp.2d at 1046 (D.Ala.2014). Under this rubric, it is undisputable that the operating engineers all of the employers subject to the multi-employer bargaining units of the CEA and AGC Agreements have performed forklift and skid steer work for those employees. As such, the work is fairly claimable by Local 18.

That is, when the union asserting its work preservation objective demonstrates that work performed by the bargaining unit is "fairly claimable" by its members, it has traditionally performed the work at issue. *Ohio Valley Coal Co. v. Pleasant Ridge Synfuels*, 54 Fed.Appx. 610, 617 (6th Cir.2002). Work is "fairly claimable" when it requires skills and abilities similar to those of the traditional work performed." *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617 (6th Cir.2002). *Accord Newspapers & Mail Deliverers*, 298 NLRB at 566. In fact, work can be fairly claimable even if the union members have performed such work at other sites for other employers. *Ohio Valley Coal Co.*, 54 Fed.App. at 617. It is "unrealistic to define the area" of a union's "legitimate job protection efforts" too narrowly, for the work preservation objective is valid if it is aimed at the "type" of jobs that a union's members historically perform and for which they have "the skills and experience." *Canada Dry Corp. v. NLRB*, 421 F.2d 907, 909 (6th Cir.1970).

Here, a preponderance of the evidence in this case demonstrates that Local 18's members have historically been employed within the multi-employer unit to operate both forklifts and skid-steers. Indeed, decades of collective bargaining, scores of letters of assignment, years of referrals, and the unchallenged testimony of a denizen of Union members all establish the immutable fact that Local 18 has a long and proud history of operating forklifts and skid-steers in the building and construction industry.

As such, the preponderance of the evidence in this case establishes Local 18's lawful work preservation objective.

i. Contractual Evidence

1. The AGC Agreement and the CEA Agreement

Both the AGC Agreement and the CEA Agreement have long identified both forklifts and skid-steers as being properly within the work jurisdiction afforded to operating engineers. Indeed, the term forklift was first included in the AGC Agreement in 1980 and has remained therein since. (*Donley's ULP*, L18 Exh. 178A, Tab A1 at pp. 25-27.) In 1989, skid-steers were first identified in the AGC Agreement. (Id., L18 Exh. 178A, Tab A4 at p. 23.) Meanwhile, since its inception in 1985, the CEA Agreement has continuously identified both forklifts and skid-steers as properly belonging to Local 18's membership. (Id., L18 Exh. 178B.) Over the course of decades, the AGC, the CEA, and the Union have repeatedly negotiated for various new and amended contracts and, during each these negotiations, have repeatedly expanded the definition of and reference to both pieces of equipment. To this point, in 2009, Paragraph 10 of the CEA Agreement – which identifies Local 18 craft jurisdiction – was modified to include specific reference to both forklifts and skid steers. (Id., L18 Exh. 178B, Tab B2 at pp. 4-5.)

The historical changes to both the CEA Agreement and the AGC Agreement demonstrate a clear intent on behalf of the parties to identify both forklifts and skid-steers as pieces of construction equipment that are within the jurisdiction of operating engineers. Moreover, the bargaining history between the entities further indicates a clear intent to impose economic sanctions upon any employer that elects to disregard the Union's craft jurisdiction. Simply put, CEA Agreement and the AGC Agreement each represent the fully incorporated intent of the parties to identify both forklifts and skid steers as equipment that is properly within the jurisdiction of operating engineers and subject to an economic penalty in the event that this equipment is assigned to someone other than an operating engineer.

2. The 1954 Agreement

Like most local labor organizations, Local 18 is a chartered local affiliate of a larger international labor organization; *to wit*, IUOE. IUOE, like most international labor organizations, is vested with the authority to enter into agreements with other international labor organizations specifying the scope and type of work falling within each organization's respective craft jurisdiction. LIUNA is also an international parent-body labor organization that has the power to issue charters to local affiliates representing common laborers in the building and construction industry. (*Donley's ULP*, TR 2077-87.) As an international parent body for its local affiliates, LIUNA is similarly vested with the authority to enter into agreements with other international labor organizations specifying the scope and type of work falling within each organization's respective craft jurisdiction. (Id.)

As a result of historic and repeated disputes between the parties regarding the proper assignment, operation, and use of various equipment including forklifts, on February 3, 1954, LIUNA and IUOE executed the 1954 Agreement. (*Donley's ULP*, L18 Exh. 82.) According to the preliminary statement contained within the 1954 Agreement, both LIUNA and IUOE were "cognizant" of "the development of machinery and equipment in connection with work in which both Organizations are involved" and were "desirous of arriving at a clarification regarding disputes that have arisen in the construction industry between the members of both Organizations." To that end, the parties set ink to paper to make "the following clarifications[.]" As it pertains to "forklifts and other similar type equipment" the 1954 Agreement clearly and unambiguously states that such equipment "will" be operated by members of IUOE. The first numbered paragraph contained within the 1954 Agreement then specifies that LIUNA members "will work in connection with said equipment for the purpose of seeing to it that the load is properly on the lift and to do any necessary tending in the event that part of the load spills[.]" The 1954 Agreement further elaborates as to the scope of each parties' work jurisdiction in the event that a load being carried by a forklift or similar type equipment spills by indicating that a LIUNA member "will

reset the material and will also give the necessary signals to the Engineer when the equipment is at the proper level or position[.]" (Id.)

For nearly six decades, LIUNA 310 has recognized that the operation of forklifts and skid-steers are properly within the jurisdiction of Local 18's membership. While not determinative of the issue, the 1954 Agreement bears significant weight in demonstrating that other labor organizations representing members in the building construction industry – including LIUNA 310 – have historically recognized that the equipment at issue in this case properly fails within the jurisdiction afforded to Local 18.

ii. Letters of Assignment

Acquiescence to Local 18's historical claim to forklift and skid-steer work is not limited to LIUNA 310. Over the course of decades, scores of building construction employers that were bound to either or both the AGC Agreement or the CEA Agreement have repeatedly recognized Local 18's claim to that work. To that end, hundreds of building construction employers that are part of the relevant bargaining unit voluntarily elected to send a letter of assignment to Local 18 wherein they specifically agree to assign forklifts and/or skid steers to operating engineers. (*Donley's II*, TR 648-652; *Donley's ULP*, L18 Exhs. 180-186, Attachment C.) In sending these letters, each of these contractors patently recognizes and affirms Local 18's historic claim to that work.

iii. Testimony and Work Referrals

The strongest evidence of Local 18's historic performance of forklift and skid-steer work can be found in uncontradicted testimony adduced from the Employers' representatives in the present matter, as well as testimony offered by Local 18 members who have made their living performing such work. Critically, Nerone's top official, its President Tom Nerone, unequivocally stated that the Employer has utilized operating engineers to perform skid steer work. (TR 124.) This statement was further bolstered by Nerone's Field Superintendent, Michael Griffin, who also confirmed that Nerone has utilized operating engineers to perform skid steer work for the Employer. (TR 175-176.)

Similarly, R.G. Smith's Chief Operating Officer, Geoffrey Nicely, readily agreed that the Employer has utilized operating engineers on forklifts and skid steers by utilizing the referral system in the AGC Agreement to place work orders for both pieces of equipment. (TR 231.) Indeed, R.G. Smith's Chief Operating Officer has personally observed operating engineers it has employed operate forklifts and skid steers on jobsites. (TR 236.) This acknowledgement was echoed by R.G. Smith's Industrial Division Manager, Michael Black, who stated that R.G. Smith has employed operating engineers to run forklifts and skid steers. (TR 302-303.) These admissions were bolstered by the specific incidences in which R.G. Smith has utilized operating engineers, pursuant to the AGC Agreement, to operate forklifts and skid steers for various projects. First, the Employer agreed that that it would have put in a work order with Local 18 for a forklift operator at project in Lorain, Ohio as recently as 2011. (TR 232.) Further, R.G. Smith has utilized operating engineers as follows under the AGC Agreement: 1) Tim Mayor was referred to operate a forklift at the Republic Lorain site in April of 2011; 2) George Quillen was referred to operate a skid steer in Akron in September of 2011; 3) Greg Golembiewski was referred to operate a forklift at the Republic Lorain site in April of 2013; 4) Linda Taylor was referred to operate a forklift at the Republic Lorain site in April of 2013; 5) Steve Bauer was referred to operate a forklift at the Republic Lorain site in May of 2013; 6) David Nonnemaker was referred to operate a forklift in Lorain, Ohio in September of 2013; 7) Terry Gradisher was referred to operate a forklift in Canton, Ohio in August of 2013; 8) Enedino Deleon was referred to operate a skid steer in Canton, Ohio in September of 2013; 9) Frank Nicosia was referred to operate a skid steer in Scio, Ohio in August of 2014; and 9) Clay Thomas was referred to operate a skid steer in Amsterdam, Ohio in August of 2014. (*Donley's ULP*, L18 Exhs. 180-186, Attachment C.) Ultimately, the uncontradicted evidence establishes that R.G. Smith has, without qualification, utilized operating engineers on forklifts on other jobsites in the same manner in which it was utilizing forklifts at the jobsite in dispute for the present matter. (TR 260, 267, 302-303.)

In addition to the undisputed evidence that the Charging Parties themselves have utilized operating engineers to run skid steers and forklifts, the multi-employer bargaining unit as a whole has

utilized operating engineers to run such equipment under the CEA and AGC Agreements. Indeed, there is uncontradicted testimony from dozens of Local 18 members that they have for many years, up and through the present day, operated forklifts and/or skid steers for such employers. (*Donley's ULP*, TR 776-796, 818-830, 846-853, 917-930, 933-954, 959-967, 990-1000, 1020-1035, 1467-1486, 1515-1520, 1527-1532, 1572-1582, 1603-1607, 1622-1636, 1639-1660, 1669-1675, 1695-1712, 1729-1738, L18 Exh. 97.) These employers include Brand Scaffold, Schnabel Foundation Company, Brandenburg, Foundation Services Corporation, Forest City Erectors, Mosser Construction, Nicholson, Tesar Industrial, Velotta Company, Goettle, Kings Excavating, Independence Excavating, Marous Brothers, Precision Engineering, McCarl's, Gem Industrial, Industrial Power Systems, Jeffers Crane, KVM Door, Henry F. Teichmann, Miller Brothers Construction, Canton Erectors, Graycor, Parks Drilling, Nelson Stark, Sofco, Baker, and Smoot Construction. (Id.) Moreover, there is no question that the forklift and skid-steer work described by its membership was work performed under either or both the AGC Agreement or the CEA Agreement. (*Donley's ULP*, L18 Attachment B.)

In addition to the foregoing direct testimony, hundreds of building construction employers have repeatedly requested that Local 18 refer an operating engineer to operate forklifts and or skid steers on building construction sites across the state of Ohio. (*Donley's ULP*, L18 Attachment C.) More importantly, Attachment C also demonstrates that the vast majority of the contractors requesting such a referral have a history of being bound to either or both of the AGC Agreement and the CEA Agreement. This offers further proof that a vast majority of building construction contractors bound to the AGC Agreement and/or the CEA Agreement have a history of assigning the operation of forklifts and skid-steer to operating engineers.

3. The Charging Parties Are Not Innocent Employers Caught Between Two Competing Union Work Demands, but Rather Have Engaged in Collusion with LIUNA 310 to Fashion a Sham Jurisdictional Dispute.

The evidence in the present matter overwhelmingly demonstrates the blatant collusion by the Charging Parties and LIUNA 310 to fashion a sham jurisdictional dispute. Where the employer is

responsible for inducing the alleged jurisdictional dispute between the unions, the employer "by its own actions . . . has created a work preservation dispute." *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB at 1020. *Accord Internatl. Longshoremen's & Warehousemen's Union, Local 62-B*, 781 F.2d at 925.

The Board's decisions regarding jurisdictional disputes have repeatedly admonished its readers that Section 8(b)(4)(D) does not stand alone, but is rather read together with Section 10(k). *E.g.*, *Teamsters Union (Safeway Stores, Inc.)*, 134 NLRB 1320, 1322 (1961). That is, a true jurisdictional dispute occurs only when there are "competing claims between rival groups of employees . . ." *Id.* Local 18's preservation position must prevail when the Charging Parties "by . . . [their] unilateral action *created* the dispute, by transferring work away" from Local 18. *Id.* at 1323. *Accord Maritime Union (Puerto Rico Marine Mgmt.)*, 227 NLRB 1081, 1083 (1977) (where Board is concerned with union's loss of membership due to employer's unilateral conduct in Sec. 10(k) proceedings, union has legitimate work preservation objective that renders the dispute non-jurisdictional).

In order to establish that a jurisdictional dispute is a sham, affirmative evidence of collusion must be demonstrated. *Laborers Local 317 (Grazzini Bros. & Co.)*, 307 NLRB 1290, 1291 (1992), fn. 5. The record – both in the instant matter, and that from *Donley's I* and *II* – is replete with evidence of the Charging Parties' active participation in a jurisdictional dispute that is of their own making. *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB at 1020. *Accord Internatl. Longshoremen's & Warehousemen's Union, Local 62-B*, 781 F.2d at 925.

Uncontradicted and unchallenged testimony demonstrates that the CEA and LIUNA 310 acted as ringmasters in a campaign to systematically undermine Local 18's ability to represent the interest of its members through enforcement of its work preservation clause in the CEA Agreement. In an attempt to jumpstart jurisdictional disputes of their own making, as early as April of 2012, the CEA's Executive Vice-President, Mr. Linville, testified in *Donley's I* that the CEA agreed to include the work preservation clause in the current CEA Agreement with Local 18 because he believed the Union would have "a hard

time enforcing" it and the signatory or CEA would attempt to couch proper work preservation grievances instituted by Local 18 in terms of a jurisdictional dispute in order to have it resolved before the Board pursuant to Sec. 10(k) . (*Donley's I*, TR. 306.) And in October of 2012, before Local 18 had filed any of its grievances in *Donley's II*, the CEA preemptively warned LIUNA 310 of an "area-wide campaign" as an assault by Local 18 to claim forklift and skid steer work from LIUNA 310 and other unions. (*Donley's II*, Jt. Exh. 4.)

Leading up to the present matter, the Charging Parties have attempted to manipulate the facts surrounding Local 18's grievances in order to frame a jurisdictional dispute between Local 18 and LIUNA 310 and thus evade their obligation to pay damages pursuant to their CBA with Local 18. Charging Parties could not proffer any reasonable explanation as to why they sent letters to LIUNA 310 claiming that they would "reassign" the work at issue to operating engineers if Local 18 was able to resolve its grievances at the Hilton and Foltz Projects. Thus, in writing to LIUNA 310, R.G. Smith claimed that arbitration to determine the assignment of forklift work would be inevitable if Local 18 prevailed in its work preservation grievance, yet the only basis it had for making such a specious determination was a prior work preservation grievance it was involved in with Local 18, wherein it resolved the grievance, which did not make any claims to the work or request for reassignment, by way of contractual damages. (TR 264-265.)

Moreover, all of these supposed reassignment letters erroneously stated that a resolution of the grievances favorable to Local 18 would contractually require the Charging Parties to reassign the work to operating engineers. (Jt. Exhs. 2, 4.) Yet, all of Local 18's grievances in this matter simply sought monetary damages pursuant to its work preservation grievances; the Charging Parties were not "contractually obligated" to assign any work to Local 18. Rendering its threat to strike responses to these letters meaningless, LIUNA 310 has acknowledged that it had a no-strike clause contained within its CBA with the CEA and had never struck against CEA signatory employers previously regarding purported jurisdictional conflicts. (*Donley's III*, TR 420-422.) Unsurprisingly, the same evidence was

elicited in *Donley's II*, wherein LIUNA 310's Business Manager, Terry Joyce, could not recall any other jurisdictional strikes or concerted slowdowns by LIUNA 310 during his tenure as Business Manager or prior as a rank-and-file member of LIUNA 310. (*Donley's II,* TR 588-589.) This collusion by LIUNA 310 is further laid bare when it was established that Nerone agreed that if there was a labor contract between Local 18 and LIUNA 310, such as the 1954 Agreement, that resolved jurisdictional disputes over certain pieces of equipment, it would honor the terms of such an agreement. (TR 147.) Yet it plainly chose not to in light of LIUNA 310's meddling. Equally damningly, LIUNA 310 sought to orchestrate Section 10(k) proceedings with R.G. Smith by holding a meeting with the Employer, even before Local 18 filed its work preservation grievance regarding the Foltz Project, in order to inform R.G. Smith that a Section 10(k) proceeding between the parties regarding the operation of forklifts would result in the Laborers' victory. (TR 315, 318.)

A Section 10(k) procedure is not "an absolution for employers that find themselves stuck between conflicting contractual obligations they created" nor is designed to "exonerate employees with unclean hands" but rather resolves legitimate "jurisdictional disputes that arise between unions without costly work stoppages . . ." *Moore-Duncan v. Sheet Metal Workers Intl. Assn. Local 27*, 624 F.Supp.2d 367, 377 (D.N.J. 2008). As such, when the alleged jurisdictional dispute is of the employer's own making, the employer is not neutral in the dispute as required under Section 10(k). Rather, the employer has an interest in one group over another to perform the work at issue. In those instances where the employer has "unclean hands," the fact that a union demanded the work is insufficient to establish a jurisdictional dispute. *Intl. Longshoremen's & Warehousemen's Union Local 62-B*, 781 F.2d at 925.

By filing shoddily constructed ULP charges, yet otherwise actively participating in the contractually mandated grievance procedures leading up to the purported jurisdictional disputes as a front to pervert the Section 10(k) process (*Donley's III*, L18 Exhs. 5, 7-17), the Charging Parties have shed their façade of impartial employers caught between the demands of two competing unions. Instead, they stand as active participants in a jurisdictional dispute they created in an attempt to avoid their contractual

obligations to render monetary damages to Local 18 pursuant to its valid work preservation clause. As such, Nerone and R.G. Smith are not innocent employers to whom Section 10(k) is available. Ultimately, the evidence taken as a whole affirmatively establishes, as required by the Board, that LIUNA 310's threats to strike were a sham. *See, e.g., Stage Employees Local 6 (Savvis Center)*, 334 NLRB 214, 215 (2001).

C. Even Assuming Arguendo That the Board Has Reasonable Cause to Believe that Sec. 8(b)(4)(D) of the Act Has Been Violated and Determines the Instant Matter on its Merits Pursuant to Sec. 10(k) of the Act, it Should Award the Disputed Work to Local 18.

Pursuant to Section 10(k) of the Act, the Board is required to resolve jurisdictional disputes by making an affirmative award of disputed work on the merits of the conflict. *NLRB v. Radio & Television Broadcast Engineers Union*, 364 U.S. 573, 579 (1961). In so doing, the Board will not formulate general rules for making jurisdictional awards, but must decide every case on its own facts. *Machinists Lodge 1743 (J.A. Jones Constr. Co.)*, 135 NLRB 1402, 1410 (1961). A representative list of relevant factors includes the presence of CBAs between the parties, employer preference, employer practice (both present and past), area and industry practice, relative skills and training, economy and efficiency of operations, and any interunion agreements. *Id. Accord Iron Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161-1162 (2003). No one factor is dispositive, as the Board makes a jurisdictional determination upon consideration of all pertinent factors. *See Printing Pressmen Local 269 (Thompson Brush-Moore Newspapers, Inc.)*, 216 NLRB 154, 157 (1975). The union awarded the disputed work may prevail by not necessarily demonstrating that *all* of the relevant factors weigh in its favor, but rather that the majority of them are favorable. *See Plumbers Local 447 (Rudolph & Sletten Inc.)*, 350 NLRB 276, 282 (2007). *See also IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383-1384 (1998). Under this calculus, if the Board deigns to construe the instant matter as a jurisdictional dispute under Sec. 10(k) of the Act, it should award the disputed work to Local 18 because it clearly prevails on the factors of collective bargaining agreements, area and industry practice, economy and efficiency of operations, employer preference, and relative skills and training.

1. Collective Bargaining Agreements

Where the unions in a Section 10(k) dispute do not have equivalent collective bargaining agreements with the employer, this factor will weigh in favor of the union with the effective CBA that covers the work in dispute. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB 201, 203 (2005). In the instant matter, Local 18 has an effective CBA via the current CEA and AGC Agreements covering the work in dispute. (TR 112, 116-117, TR 218-220.) Likewise, the LIUNA 310 also has an effective CBA with the Employers for the work in dispute. (Emp. Exh. 2.) Normally, where the unions in dispute have effective CBAs with the employer covering the same disputed work, this factor will not favor any union. *Laborers Local 113 (Super Excavators)*, 327 at 115. However, there are two important considerations that shift this factor in favor of Local 18.

First, unlike Local 18's agreement with the CEA, the CBA negotiated by LIUNA 310 fails to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to a LIUNA affiliate is transferred to another non-LIUNA employee. Second, it was unquestionably established that until the current CBA, prior agreements between LIUNA 310 and the CEA failed to identify skid steers or forklifts in any way, shape, or form. (TR 346-347.) Tellingly, both the Charging Parties and LIUNA 310 chose not to provide predecessor agreements to the Hearing Officer. By contrast, skid steers and forklifts were identified as construction equipment that is exclusively within Local 18's craft jurisdiction, both in the current CEA Agreement *and* its predecessors. (*Donley's III*, TR 84, 143, 217, 254, 362-363, Jt. Exh. 3.)

These circumstances support a finding that this factor weighs in favor of Local 18 because "the Board looks to whether one of [the CBAs] gives a superior claim." *Bridge Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161 (2003). This more nuanced balancing test utilized by the Board in analyzing the CBA factor has been upheld in other contexts as well. *See Laborers District Council of Ohio Local 265 (AMS Constr.)*, 356 NLRB No. 57, *19-20 (2010) (where Union A's CBA specifically

referred to the disputed work, but the Union B's CBA was worded in more general terms, the CBA factor was in favor of Union A). Thus, on balance, the CBA factor should be accorded to Local 18.

2. Area and Industry Practice

Area and industry practice for the assignment of the disputed work clearly favors Local 18. For over a decade, the Charging Parties have recognized that the operation of skid steers and forklifts properly falls within the jurisdiction of Local 18 by utilizing operating engineers to operate them.

Here, a preponderance of the evidence in this case demonstrates that Local 18's members have historically been employed within the multi-employer unit to operate both forklifts and skid-steers. Indeed, decades of collective bargaining, scores of letters of assignment, years of referrals, and the unchallenged testimony of a denizen of Union members all establish the immutable fact that Local 18 has a long and proud history of operating forklifts and skid-steers in the building and construction industry.

Over the course of decades, scores of building construction employers that were bound to either or both the AGC Agreement or the CEA Agreement have repeatedly recognized Local 18's claim to that work. To that end, hundreds of building construction employers that are part of the relevant bargaining unit voluntarily elected to send a letter of assignment to Local 18 wherein they specifically agree to assign forklifts and/or skid steers to operating engineers. (*Donley's II*, TR 648-652; *Donley's ULP*, L18 Exhs. 180-186, Attachment C.) In sending these letters, each of these contractors patently recognizes and affirms Local 18's historic claim to that work.

Indeed, Nerone has utilized operating engineers to perform skid steer work. (TR 124, 175-176.) Further, R.G. Smith has employed operating engineers on forklifts and skid steers by utilizing the referral system in the AGC Agreement to place work orders for both pieces of equipment. (TR 231, 302-303.) R.G. Smith also agreed that that it would have put in a work order with Local 18 for a forklift operator at project in Lorain, Ohio as recently as 2011. (TR 232.) Indeed, R.G. Smith's Chief Operating Officer has personally observed operating engineers it has employed operate forklifts and skid steers on jobsites. (TR 236.) Ultimately, the uncontradicted evidence establishes that R.G. Smith has, without qualification,

utilized operating engineers on forklifts on other jobsites in the same manner in which it was utilizing forklifts at the jobsite in dispute for the present matter. (TR 260, 267, 302-303.)

Consistent with R.G. Smith's practice and pattern of employing Local 18 members to operate forklifts and skid steers, dozens of Local 18 members have worked for employers bound to both or either of the CEA and AGC Agreements for many years, up and through the present day, operating forklifts and/or skid steers. (*Donley's ULP*, TR 776-796, 818-830, 846-853, 917-930, 933-954, 959-967, 990-1000, 1020-1035, 1467-1486, 1515-1520, 1527-1532, 1572-1582, 1603-1607, 1622-1636, 1639-1660, 1669-1675, 1695-1712, 1729-1738, L18 Exh. 97.) Moreover, there is no question that the forklift and skid-steer work described by its membership was work performed under either or both the AGC Agreement or the CEA Agreement. (*Donley's ULP*, L18 Attachment B.)

Here, Local 18's superior showing of letters of assignment, work referrals, and area practice, both in quantity and type support a finding in Local 18's favor. *IBEW Local 71 (Capital Electric Line Builders Inc.),* 355 NLRB 140, 143 (2010). *Accord Operating Engineers Local 825 (Nichols Electric Co.)*, 137 NLRB 1425, 1433 (1962), *enf.* 315 F.2d 695 (3rd Cir.1963). Thus, on balance, the area and industry factor should be accorded to Local 18.

3. Interunion Agreements

An interunion agreement between the IUOE and the International Hod Carriers, Building and Common Laborers Union of America (LIUNA's predecessor) has existed since 1954. (*Donley's ULP*, L18 Exh. 82.) This agreement stated that forklifts and other similar type of equipment would be operating by operating engineers. (Id.) The existence of this Agreement for such a long period of time is clearly demonstrative of the fact that Local 18 members have historically been favored and appointed as forklift operators throughout Ohio.

The Board has long acknowledged the existence of this very interunion agreement since 1958, in which it recognized that the IUOE and LIUNA "had made multiple attempts to "carry out" the 1954 Agreement regarding forklifts. *Operating Engineers, Local 12 (W. Coast Masonry Contrs., Inc.)*, 120

NLRB 53, 55 (1958), fn 1. The Board's evaluation of an interunion agreement's weight depends on its applicability to the unions and whether either of the union's subsequent CBAs have expressly listed the equipment at issue as within its craft jurisdiction. *See Operating Engineers, Local 478 (Deluca-Lombardo),* 314 NLRB 589, 592-593 (1994). In the present matter, the 1954 Agreement clearly binds Local 18 and LIUNA 310 to the terms of the Agreement as third-party beneficiaries. Moreover, until 2012, only the Local 18 CEA Agreements throughout the decades specifically identified forklifts and skid steers as equipment falling within Local 18's exclusive craft jurisdiction. (Jt. Exh. 3.) Thus, under the Board's standard in *Operating Engineers, Local 478 (Deluca-Lombardo),* the 1954 Agreement is clearly granted substantial weight in the assessment as to whom the work at issue should be awarded. Indeed, the Board has specifically recognized and utilized the 1954 Agreement in prior Section 10(k) determinations. *See N. Cal. Dist. Council of Laborers (RMC Lonestar),* 309 NLRB 412, 413 (1992) (under 1954 Agreement as concerning drilling operations, based on the craft delineation awarding such work to operating engineers where drill and compressor were part of same unit, this factor was in favor of operating engineers where work at issue involved such equipment). Thus, on balance, the interunion factor should be accorded to Local 18.

4. Economy and Efficiency of Operations

While conventional analyses of economy and efficiency of operations involve the Board investigating the nature of the work performed by the competing unions, *e.g., Laborers' Local 860 (Anthony Allega Cement Contractor, Inc.),* 336 NLRB 358, 363 (2001), the unique facts of the instant dispute beg an inquiry in another direction. Namely, the finding that it would be more economical to award the disputed work to LIUNA 310 would result in an absurd situation in which the Board essentially gives sanction to the Charging Parties' breach of the work preservation clauses in the CEA Agreement with Local 18. By not awarding Local 18 the disputed work, the Employers would be subject to both the labor costs associated with LIUNA 310 *and* damages costs associated with Local 18 pursuing

any and all grievances that allege a breach of the work preservation clause in the current CEA Agreement.

In examining this factor, the Board has previously addressed conflicts between contractual terms and workplace economy by recognizing that where conditions in CBA clauses would result in impractical costs to the employer, it would not award the disputed work to the union that would activate such unnecessary expenditures. *E.g., Teamsters Local 1187 (Anheuser-Busch, Inc.),* 258 NLRB 997, 1001 (1981) (where awarding work to Union A would result in contractually mandated job-bidding restrictions and work guarantees potentially subjecting the employer, *inter alia*, to greater costs, the Board found this factor in favor of Union B). *Accord Glaziers Local 1621 (Hart Glass Co.),* 216 NLRB 641, 643 (1975). Thus, the Charging Parties cannot state that it is more efficient and economical to retain only laborers when it is mandated by the current CEA Agreement to pay damages to operating engineers in the event that they assign forklift and skid steer work to LIUNA 310 members.

Additionally, the unchallenged evidence from the record established that the Charging Parties had full authority to assign the operation of skid steers and forklifts, as well as any attendant duties, to Local 18 members. Thus, at the Hilton Project, Nerone was also utilizing excavators, run by operating engineers, to backfill trenches. (TR 175.) Nerone agreed that any such operating engineer running an excavator had the capacity and capability to operate a skid steer for the purpose of stoning pipe at the Hilton project, as well. (Id.) Nerone further agreed that an operating engineer could very well temporarily cease operating an excavator, pursuant to the Employer's request, in order to run a skid steer for the purpose of stoning pipe, and then recommence the operation of the excavator. (TR 181.) And R.G. Smith agreed that it could very well require an operating engineer running an excavator to temporarily cease operating that equipment, in order to run a skid steer, then recommence the operation of the excavator when necessary. (TR 255, 309.) Thus, on balance, the economy and efficiency of operations factor should be accorded to Local 18.

5. Employer Preference

The Board will treat employer preference with great skepticism when it appears that the preference is not "representative of a free and unencumbered choice." *ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), *rev'd on other grounds*, 224 NLRB 275 (1979). In the instant matter, the Charging Parties' preference is inextricably linked with their prospect of being subject to damages under the work preservation clause of Local 18's current CEA and AGC Agreements. To find that the employer preference factor weighs in favor of LIUNA 310 would essentially mean that the Charging Parties' labor preference is based on an illegitimate desire to avoid their lawfully negotiated collective bargaining terms with Local 18. The Employers' preference is neither "free" nor "unencumbered" but based on a sham. Thus, the factor of efficiency of operations and employer preference should be accorded to Local 18 because to do otherwise would cause the Board to vitiate the duly negotiated CBAs between Local 18, CEA, and AGC that were executed pursuant to employee collective bargaining rights under Section 7 of the Act.

6. Relative Skills and Training

In comparing the relative skills and training of the conflicting unions over the disputed work, the Board has held that, all else being equal, formal training is preferable to on-the-job training. *Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy)*, 336 NLRB 1044, 1045 (2001). This results in a finding in favor of the union that demonstrates a greater usage of formal training. *Id*. Thus, Local 18 has developed a state-wide training program, via the Ohio Operating Engineers Apprenticeship and Journeyman Training Program ("Training Program") to establish four comprehensive training sites throughout Ohio (Ritchfield, Logan, Miamisburg, and Cygnet) with both outdoor and indoor all-weather locations and each with specific training for skid steers and mini excavators that faithfully replicate actual working conditions. (*Donley's III*, Jt. Exh. 10A.) As stated by Donald Black, the Administrator of the Training Program, such training is necessary as operation of skid steers and forklifts is within the exclusive craft jurisdiction of Local 18. (Id.) Along with classes offered

throughout the year, Local 18 offers specialized training in forklift and skid steer operation for Local 18 members who operate in the gas and pipeline industry, with over a dozen individual skid steers and excavators each, located throughout the four training sites. (*Donley's III*, TR 447, 455-457.) Moreover, such training includes required classroom attendance and field work until working proficiency is obtained, as well detailed training manuals, training course materials, test booklets, and student workbooks for skid steer and mini excavators, applicable to all the various attachments that may be added to that equipment in their industrial operation. (*Donley's III*, Jt. Exhs. 10C to 10I.) The Training Program has also developed an alliance agreement with the Occupational Safety and Health Administration ("OSHA") for the purposes of establishing safety standards for training operating engineers on various pieces of equipment. (*Donley's III*, Jt. Exh. 10B.) The Training Program has produced over 600 Local 18 members who are formally certified in skid steer operation. (*Donley's III*, Jt. Exh. 8.)

Although testimony was offered that LIUNA 310 offers training for their members, training occurs at a sole site located in Ohio. (TR 397; *Donley's II*, TR 578.) Furthermore, such training offered for forklifts is not provided by the Laborers directly, but by certain manufacturers of the equipment. (TR 339-340.)

In sum, the record clearly establishes that there should not be a "stalemate" due to "equally credible testimony" regarding relative skills and training. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB at 204. Rather, because it would be no less efficient to utilized operating engineers on skid steers and forklifts, and as Local 18 has developed a historically more robust training and skills-development program than LIUNA 310, the Union contains members who are better suited to perform the disputed work with the Charging Parties.

D. <u>If, and Only If, The Board Determines That Local 18 Is Not Entitled To The Disputed Work, Charging Parties Are Not Entitled To A Broad Award.</u>

In the event that Local 18 is not awarded the disputed work, a contrary award should be limited to the job sites that were the subject of Local 18's grievances. The Board will only consider increasing the

scope of its award if the *disputed work* has been a continuous source of controversy in the relevant geographic area, related disputes are likely to reoccur, and the charged union has shown a proclivity to use proscribed means in an attempt to secure similar disputed work. *Operating Engineers Local 318 (Foeste Masonry)*, 322 NLRB 709, 714 (1996), citing *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993). *Accord Bricklayers Local 21 (Sesco Inc.)*, 303 NLRB 401, 403 (1991). All three of these prerequisites must be satisfied and the evidentiary burden in doing so is demanding because "a 10(k) award is ordinarily limited in scope to the particular job-site or jobsites where the proscribed 8(b)(4)(D) conduct has occurred." *IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1148 (1980).

The Charging Parties cannot demonstrate that a broad award is warranted under the exacting evidentiary standard required by the Board to issue an area-wide award. The record is absent of any evidence that would indicate the disputed work has been a continuous source of controversy that would cause similar reoccurrences *and* that Local 18 has demonstrated a habit to use proscribed means to secure similarly disputed work. The existence alone of Local 18's work preservation grievances as against the Charging Parties is *insufficient* to justify a broad award absent evidence of other threatening behavior by the union against whom the award is made. *See IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987) (broad 10(k) award granted in consideration of prior jurisdictional awards *only if* coupled with threat by union against whom award was made to "cause trouble on every other" employer job site). These grievances are merely part and parcel of Local 18's attempt to enforce its above-described legitimate contractual objectives. The record contains no evidence of any purported continuous threatening behavior by Local 18.

The Board's decisions in *Donley's I, II,* and *III* merely determined whether there was reasonable cause to believe Sec. 8(b)(4)(D) of the Act was violated, and if so, to which union the disputed work should be awarded. Its decisions *do not* and *cannot* determine whether Local 18 has violated Section 8(b)(4)(D). Rather, an adversarial and adjudicatory hearing before an administrative law judge must first issue before the Board can decide whether a Charged Party, such as Local 18, has violated the Act.

Warehouse Union Local 6 (Golden Grain Macaroni Co.), 289 NLRB 1, 2 (1988). After an ALJ's Decision, it is then the Board's subsequent responsibility to make the "ultimate determination" of any alleged unfair labor practices. *ITT v. IBEW Local 134*, 419 U.S. 428, 446, 95 S.Ct. 600, 42 L.Ed.2d 558 (1975). The Board has not rendered a Decision in the *Donley's ULP* matter, nor has *Donley's III* proceeded beyond an initial 10(k) determination. Ultimately, if the Board decides to not award the disputed work to Local 18, it should confine the adverse award to the jobsites that were the subject of Local 18's grievances.

Moreover, "[t]he Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work." *E.g., Ohio and Vicinity Regional Council of Carpenters (Competitive Interiors)*, 348 NLRB 266, 271 (2006). Where such a charged party also has a proclivity to engage in unlawful activity to obtain similar work, such as threats to strike, an area-wide award lacks merit. *Bricklayers (W.R. Weis Co., Inc.)*, 336 NLRB 699, 702 (2001), fn. 6. This principle holds true in the present matter, as there is no question that LIUNA 310, as the charged party to whom the work may be awarded, is engaged in a campaign of threats to strike. (*E.g.*, Jt. Exhs. 3, 5; *Donley's III*, TR 420-422 *Donley's II*, Jt. Exh. 5.) If the Board deigns to award the work to the Charged Party LIUNA 310 and the Charging Parties continue assigning the work at issue to LIUNA 310, the notion of an area-wide award lacks complete merit in this dispute.

VII. Conclusion

Accordingly, for all the forgoing reasons, Local 18 hereby requests that the Region's February 12 Order and Notice of Hearing be quashed and the hearing in this matter canceled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was filed with National Labor Relations Board, Region 8, and served in person to the following on this 1st day of May 2015:

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